

Office of Chief Counsel
Internal Revenue Service
memorandum

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WFCastor

date: SEP 14 2001

to: Manager, Collection Group 02 Stop 5124-OKC
Compliance Territory 1

from: Associate Area Counsel (SB/SE) Stop 2000-OKC

subject: **Advisory Opinion: Whether Taxpayer Can Obtain Postponement of Sale
of Administratively Seized Property by Proposing Installment
Agreement**

This memorandum is in response to a question raised at your group meeting on May 29, 2001, concerning whether, following an equivalency hearing where an installment agreement was proposed by the Office of Appeals, but not accepted by the taxpayer, the taxpayer can obtain a postponement of the sale of property administratively seized by proposing an installment agreement at or near the time of sale.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

DISCUSSION

Under I.R.C. § 6343, the Internal Revenue Service ("the Service"), as prescribed by regulations, must generally release a levy upon property if, inter alia, the taxpayer has entered into an installment agreement, unless the agreement provides otherwise. I.R.C. § 6343(a)(1)(C); Treas. Reg. § 301.6343-1(b)(3); IRM 5.11.1.3.9(3), 5.14.1.5(2). An exception exists where a release would jeopardize the secured creditor status of the United States, e.g., where there is an intervening judgment lien creditor and a notice of federal tax lien has not been filed. I.R.C. § 6343(a)(1); Treas. Reg. § 301.6343-1(b)(3).

Assuming the United States' secured creditor status would not be jeopardized, the question arises as to whether the Service must release a seizure where a taxpayer subsequently offers an

installment agreement at or near the time of sale. The regulations provide that "[t]he director must release the levy ... if he or she determines that ... [t]he taxpayer has entered into an [installment] agreement" Treas. Reg. § 301.6343-1(b)(3). However, the regulations also provide that "[a] taxpayer who wishes to obtain a release of a levy must submit a request for release in writing or by telephone to the district director."¹ Treas. Reg. § 301.6343-1(c)(1). Moreover, except in extraordinary circumstances, a request for release must be made more than five days prior to a scheduled sale of the property. Treas. Reg. § 301.6343-1(c)(2).

Upon receipt of a request for release of levy, the director must promptly make a determination concerning release prior to sale in all cases except those where the request for release is made five or fewer days prior to a scheduled sale of the property to which the levy relates. Treas. Reg. § 301.6343-1(c)(3)(i) (emphasis added). If the request is made 30 or more days prior to sale, the director will generally have 30 days to make a determination as to whether to release a levy. Treas. Reg. § 301.6343-1(c)(3)(ii). If the request is made less than 30 days but more than five days prior to a scheduled sale, a determination must be made prior to the scheduled sale, and, if necessary, the director may postpone the scheduled sale in order to make the required determination. Treas. Reg. § 301.6343-1(c)(3)(ii).

However, if a request for a release is made five or fewer days prior to a scheduled sale, the director has the discretion, but is not required, to make a determination of whether to release the levy prior to sale. Treas. Reg. § 301.6343-1(c)(3)(iii). Also, while a taxpayer may obtain an expedited (10 business days) determination from the director with respect to certain "essential" business property, the levy of which prevents the taxpayer from carrying on its business, such request must nevertheless be submitted more than five days prior to a scheduled sale of the property to which the levy relates. Treas. Reg. § 301.6343-1(d)(1)(i).

The Internal Revenue Manual ("the IRM") addresses pending and active installment agreements in the context of levy action. IRM 5.11.1.3.9; 5.14.1.5 and I.R.C. § 6331(k). Generally, if a taxpayer makes an offer to pay a liability through installments before a levy is issued, no levies can be served while the

¹ The provisions of I.R.C. § 6343 and Treas. Reg. § 301.6343-1 do not apply in the case of a seizure of perishable goods. Those seizures are governed by the provisions of I.R.C. § 6336 and Treas. Reg. § 301.6336-1.

installment agreement proposal is pending. IRM 5.11.1.3.9(1) (emphasis added). Also, if a levy was issued before an installment agreement is approved, the levy must be released, unless the agreement provides otherwise. IRM 5.11.1.3.9(3), 5.14.1.5(2). If, however, a levy was served and then the taxpayer offers to pay in installments, i.e., the installment agreement is not approved, but merely pending, the levy does not have to be released during the pendency of the offer. IRM 5.11.1.3.9(3), 5.14.1.5(2).

Thus, if the Service seizes a taxpayer's property, and the taxpayer subsequently offers an installment agreement, the Service is not required to release the seizure until after a determination is made with respect to the installment agreement. Moreover, where the request for release, based upon the offer of the installment agreement, is made within five or fewer days of the schedule sale, the Service's determination to release the seizure prior to sale is discretionary. I.R.C. § 6343.

The scenario in your question involved a taxpayer who, following an equivalency hearing where an installment agreement was proposed by Appeals but not accepted by the taxpayer, sought to obtain a postponement of the sale of property administratively seized by proposing an installment agreement at the sale. Because the proposal and request were not made more than five days of sale, the Service may exercise discretion as to whether to consider the release. If, however, the taxpayer makes a request for a release of a levy more than five days before the schedule sale of the property that is the subject of the levy, the Service is required to make a determination concerning the release prior to sale. Treas. Reg. § 301.6343-1(b), (c).

Your scenario also involved an installment agreement proposal by a taxpayer, following an equivalency hearing where an installment agreement was proposed by Appeals but not accepted by the taxpayer. Under I.R.C. § 6330, the Service must offer a taxpayer a Collection Due Process ("CDP") hearing with respect to a levy or seizure action. If the taxpayer does not make a timely request for a CDP hearing, I.R.C. § 6330 does not apply. The Service will, instead, provide such a taxpayer with an equivalent hearing. The taxpayer, however, does not enjoy the same spectrum of rights he would otherwise enjoy as a result of a CDP hearing. Treas. Reg. § 301.6330-1T(i). Specifically, a taxpayer is not given the right to discuss a change in circumstances with an appeals officer under the retained jurisdiction doctrine of I.R.C. § 6330(d) and is not afforded judicial review under that section.

Thus, in the scenario you proposed, the Service may or may not be required to make a determination whether to release a seizure, depending upon when the request is made by the taxpayer. In the

event the Service is required to make a determination concerning the release, the Service is not required to make such a release based on a pending installment agreement.

If you have any questions, please call Will Castor of our office at extension 4818. We are closing our file with this memorandum.

/s/ MICHAEL J. O'BRIEN

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